

Health Care & Retirement Corp. d/b/a Heartland of Beckley and District 1199, The Health Care and Social Service Union, SEIU, AFL-CIO, Petitioner. Case 9-RC-16895

July 27, 1999

DECISION ON REVIEW AND ORDER

BY CHAIRMAN TRUESDALE AND MEMBERS HURTGEN
AND BRAME

Following a hearing held before a hearing officer of the National Labor Relations Board, on June 5, 1997, the Regional Director for Region 9 issued a Decision and Direction of Election. The Regional Director found that approximately 43 to 48 licensed practical nurses (LPNs) that District 1199, The Health Care and Social Service Union, SEIU, AFL-CIO (the Union), petitioned to represent for collective-bargaining purposes did not possess any of the indicia required by the Act to establish supervisory status and thus constituted an appropriate unit. Based on this finding, the Regional Director directed that an election be held in the unit sought. On June 18, 1997, the Employer filed a request for stay and review of the Regional Director's decision. Thereafter, by Order dated July 1, 1997, the Board granted the Employer's request for review solely with respect to the Regional Director's finding that the participation of the Employer's LPNs in the existing disciplinary procedure is essentially a reporting function not establishing supervisory authority. In all other respects, the request for review was denied. The motion to stay the election was also denied. On July 2 and 3, 1997, the Board conducted a secret-ballot election to determine whether a majority of the LPNs wished to be represented by the Union. The ballots from this election have been impounded pending review of the Regional Director's decision.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

Having carefully considered the matter, we find, contrary to the Regional Director, that the Employer has met its burden of establishing that the LPNs, through their role in the Employer's disciplinary procedure, do possess supervisory authority, and that, therefore, the petition should be dismissed.

The Employer is a nursing home located in Beckley, West Virginia. The Union currently represents a unit of all full-time and part-time service employees at the Employer's facility, including approximately 84 certified nursing assistants (CNAs). There is no history of collective bargaining affecting the LPNs involved in this proceeding.

It is well established that the possession of any one of the indicia specified in Section 2(11) of the Act is sufficient to confer supervisory status if the authority is exercised with independent judgment and not in a routine manner. *Hydro Conduit Corp.*, 254 NLRB 433, 437

(1981). Accordingly, the specific issue involved here, upon which review was granted, is whether the Employer's LPNs, when issuing disciplinary reports concerning the Employer's CNAs, were exercising independent judgment, or were merely acting in a routine manner without the ability to exercise any significant discretion.

A proper resolution of this issue requires the careful examination and interpretation of a series of events relating to changes in the Employer's disciplinary system that were not fully addressed in the Regional Director's decision.

The Employer has for some years utilized a progressive disciplinary system which has three categories: (1) "Type C (Minor)," imposes a verbal warning for a first violation, a written warning for the second violation, a final written warning for the third violation, and discharge for the fourth violation; (2) "Type B (Serious)," imposes a final written warning for the first violation and discharge for the second violation; and (3) "Type A (Major)," imposes immediate suspension pending discharge. The record reflects that LPNs regularly issued warnings and had discretion to determine when and why to issue warnings under this system.¹

In March 1997, in response to criticisms made in a state survey of the Employer's business, the Employer held meetings with its LPNs to implement some changes in the system they were to follow when disciplining CNAs. The record clearly shows that, while the principal aim of these meetings was to introduce a new process for the disciplining of CNAs by LPNs solely with regard to conduct constituting patient abuse, some of the time was also directed toward reasserting and reemphasizing the LPNs' authority to discipline the CNAs generally. The specific change in process with respect to disciplining for patient abuse was implemented because alleged abuse of patients by the CNAs had been the focus of the recent state survey. As found by the Regional Director, the March 1997, meetings resulted in the creation of an "Investigation Flow Sheet" which instructed the LPNs on what steps they should take in the event of an alleged instance of patient abuse by a CNA. The LPNs were instructed to complete the form and then submit it to an administrator, who would take whatever disciplinary action was deemed appropriate. At issue here is whether the procedures introduced at the March 7, 1997 meeting augmented the Employer's established progressive disciplinary system, or replaced that system in toto with a new system.

Although he did not address this point in detail, in his decision the Regional Director implicitly found that under the progressive disciplinary system the Employer's LPNs had the authority to exercise independent judgment

¹ The Employer stipulated that LPNs do not have authority to terminate employees under the progressive disciplinary system.

in disciplining the CNAs. He indicated, however, that this finding was not dispositive of any pending issue in light of his further conclusion that the meetings that commenced on March 7, 1997, created a new disciplinary system which entirely supplanted the former one and left the LPNs with significantly less authority than they had previously.

We do not agree with the Regional Director's interpretation of the changes made by the Employer as of March 7, 1997, and therefore cannot agree with his conclusion. The record reflects that the procedures that were introduced in response to the state survey were directed toward a specific problem relating to a single type of conduct, patient abuse. There is no evidence in the record that changes were made in the procedures that the LPNs were to follow when disciplining the CNAs concerning any other type or category of conduct. With regard to all these other matters, the Employer simply stressed that the system as it had been operating could work more efficiently and reiterated the need for the LPNs to act on their authority to discipline the CNAs according to previously established procedures, which were defined in their supervisors' handbooks. The preexisting procedures required the LPNs to exercise independent judgment when disciplining CNAs, for example, by determining what category to classify a given infraction

mining what category to classify a given infraction of the Employer's rules and to take the appropriate action. Thus, in the March 7, 1997 meetings, the Employer reinforced the existing system without making any substantive deletions or changes, except with respect to alleged cases of patient abuse. It follows from the discussion above that the Employer did not create a new, comprehensive system for the disciplining of CNAs by LPNs in response to the state survey.

The Regional Director having found that prior to March 7 the Employer's LPNs had the authority to discipline, and our having found that this authority was not diminished by any policy changes resulting from the meetings of March 1997, we conclude, contrary to the Regional Director, that the Employer has met its burden of establishing that the LPNs possess supervisory authority.

Accordingly, we conclude that the petitioned-for unit of LPNs is not appropriate for the purposes of collective bargaining. We therefore reverse the Regional Director's Decision and Direction of Election, and shall dismiss the petition.

ORDER

The petition is dismissed.